Cert wtv

No. 81-6756

RECEIVED
JUL 23 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MELVIN E. TUTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 81-6756

MELVIN E. TUTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a prior conviction for which he was sentenced under the Federal Youth Corrections Act (FYCA), 18 U.S.C. 5005 et seq., cannot serve as the basis for a subsequent felony recidivist sentence.

1. In 1970, petitioner was convicted in the District of Columbia Court of General Sessions of carrying a pistol without a license, in violation of D.C. Code §22-3204. He was sentenced under the FYCA (18 U.S.C. 5010(a)) to two years' probation. Petitioner was unconditionally discharged at the end of the two years. He did not apply for a certificate setting aside his conviction, and no such certificate was issued. Pet. 4.

Following a jury trial in the Superior Court of the District of Columbia in the present case, petitioner was again convicted of carrying a pistol without a license in violation of

D.C. law.[1] Prior to sentencing and pursuant to D.C. Code §23-111, the prosecutor informed the trial court of the previous conviction, which subjected petitioner to an enhanced penalty under D.C. Code §22-3204. Based on the earlier conviction, petitioner was sentenced as a felon rather than as a misdemeanant. He received a sentence of two to six years' imprisonment. The District of Columbia Court of Appeals affirmed (Pet. App. 1a-6a).

2. Relying on United States v. Arrington, 618 F.2d 1119 (5th Cir. 1980), cert. denied, 449 U.S. 1086 (1981), petitioner claims that his unconditional discharge from probation automatically set aside his FYCA conviction, so that that conviction could not subsequently be used as the basis for a recidivist penalty. In Arrington, the Fifth Circuit had held that a conviction under the FYCA is automatically set aside whenever the defendant is sentenced to a prison term shorter than the maximum possible sentence and is therefore unconditionally discharged. Thus, the court held, Arrington's previous FYCA felony convictions could not serve as a basis for convictions for violating 18 U.S.C. App. 1202(a)(1), which prohibits the possession of firearms by a convicted felon.[2] Here, however, the District of Columbia Court of Appeals found that the plain language of the FYCA limits the availability of the set-aside provision to those youth offenders whom the sentencing court, in its discretion, chooses to discharge before the expiration of the sentence originally imposed on them. Pet.

1/ The jury acquitted petitioner on a charge of assault with a dangerous weapon.

2/ The Fifth Circuit upheld Arrington's convictions on two other firearms counts, which did not require a prior conviction as a predicate (618 F.2d at 1127). Because only Arrington sought this Court's review of the Fifth Circuit's decision, the question presented by this case was not raised in the petition for a writ of certiorari in Arrington.

App. 3a. Accordingly, the court below held, the mere fact of petitioner's having been unconditionally discharged upon the completion of his probation sentence does not prevent the use of the prior conviction as a basis for imposition of a subsequent recidivist penalty.

Noting that a direct conflict thus exists on the interpretation of 18 U.S.C. 5021,3/ petitioner asserts that this case merits review by this Court. In fact, however, the interpretation adopted by the court below is the only one consistent with the plain language of the statute, its legislative history, and the weight of the judicial precedent. With all due respect, we suggest that the Arrington decision is so clearly aberrational that the conflict it creates does not require resolution by this Court.

Section 5021(b), which specifically concerns probationary FYCA sentences, provides (emphasis supplied):

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

Analogously, Section 5021(a), which applies to terms of incarceration, requires the automatic set-aside of the conviction of a youth offender who is unconditionally discharged "before the expiration of the maximum sentence imposed on him." It is thus apparent from the wording of the statute itself that a conviction will be set aside only when a court (or the Parole

---

3/ The parallel wording of the two subsections leaves no basis for distinguishing between the two cases on the ground that the Arrington court was construing 18 U.S.C. 5021(a), which deals with sentences of imprisonment, whereas the present case involves 5021(b), which involves probationary sentences.

Commission) has discharged the youth offender prior to expiration of his sentence (whether of incarceration or probation).4/

The legislative history of the statute bolsters the construction placed on it by the court below. At the hearings on the FYCA before the Senate Committee on the Judiciary, Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia, a member of the Judicial Conference committee that originally recommended the passage of the Act (Correctional System for Youth Offenders: Hearings on S. 1114 and S. 2609 Before a Subcomm. of the Senate Comm. on the Judiciary, 81st Cong., 1st Sess. 8 (1949)) commented on the set-aside provision (id. at 14; emphasis added):

> Committed youth offenders who earn their final discharge before the end of their maximum term have their records cleared and their civil rights restored.

He later reiterated (id. at 19; emphasis added) that "when the [Youth Correction] Division turns them out ahead of their maximum sentence, this law blots out their sentence and lets them go without any stigma on their life."

Furthermore, the House Report on the FYCA quotes the following language from a letter from the Deputy Attorney General (H.R. Rep. No. 2979, 81st Cong., 2d Sess. 9 (1950)):

> If [the youthful offender] has responded to treatment and the Youth Division is of the opinion that his rehabilitation has been accomplished, the youth offender may be discharged unconditionally before the full maximum term has expired, in which event the conviction shall be automatically set aside and the Division shall issue to the youth offender a certificate to that effect.

As Judge Laws' remarks and the House Report thus make clear, the set-aside provision is not intended to be an automatic protection provided to all youth offenders following completion

---

4/ Even petitioner recognizes (Pet. 7) that "the language of Section 5021(a) would appear to limit the benefits of set-aside to those youthful offenders unconditionally released prior to the expiration of the maximum sentence imposed upon them * * *."

of their sentences, regardless of their progress while committed or on probation. Rather, it allows only those offenders who display such exemplary behavior during their commitment or probation that early termination of their sentences is warranted to have their convictions erased from the record.

Finally, the clear weight of authority in the federal courts calls for giving the statutory language effect as written. In Doszynski v. United States, 418 U.S. 424 (1974), this Court held, inter alia, that a trial court is required, prior to sentencing a youth offender as an adult under 18 U.S.C. 5010(d), to make an express finding on the record that the defendant would not benefit from treatment under the FYCA. In reversing and remanding for further proceedings, this Court noted that if the defendant already had served all of his sentence, including probation, he could take advantage of the set-aside provision of the Act only if he were resentenced and if he obtained an early release, as required by 18 U.S.C. 5021 (418 U.S. at 430 n.6; citations omitted; emphasis added):

> To be eligible to have his conviction set aside under the Act, petitioner would have to be committed under § 5010(b) or (c), or placed on probation under § 5010(a), and achieve the early discharge required by § 5021(a) or (b). While this might require the imposition of a longer sentence than he originally received, petitioner represents through counsel that he would voluntarily seek resentencing which would place him back on probation. The District Court would then be able, as a matter of discretion, to provide the requisite early unconditional discharge. 18 U.S.C. § 5021(b).

The courts of appeals likewise have generally recognized that a set-aside may be obtained only where a youth offender has been released from probation or incarceration ahead of schedule. Watts v. Hadden, 651 F.2d 1354, 1379 (10th Cir. 1981); Doe v. Webster, 606 F.2d 1226, 1234-1236 (D.C. Cir. 1979); Cox v. United States, 473 F.2d 334, 336 (4th Cir.), cert. denied, 414 U.S. 869 (1973); Cunningham v. United States, 461 F.2d 995, 996 (9th Cir. 1972); United States v. Bronsen, 449

F.2d 302, 305 (10th Cir.), cert. denied, 405 U.S. 949 (1971); Nast v. United States, 415 F.2d 338, 340 (10th Cir. 1969); Tatum v. United States, 310 F.2d 854, 855-856 (D.C. Cir. 1962).

In holding to the contrary, the Arrington court focused (618 F.2d at 1123) on 18 U.S.C. 5017(c), which makes an unconditional discharge from a sentence of imprisonment imposed under Section 5010(b) mandatory after six years. From this the Fifth Circuit presumably concluded that, because the maximum possible adult sentence that could have been imposed on Arrington exceeded six years, an unconditional discharge after six years must mean an early expiration of his sentence and, hence, automatic expunction of the conviction. 618 F.2d at 1123-1124. But the operative language of Section 5021(a) (emphasis added) -- "before the expiration of the maximum sentence imposed upon him" -- can only refer to the actual sentence originally imposed by the court, not to the maximum possible sentence. A similar phrase in Section 5021(b), "prior to the expiration of the maximum period of probation theretofore fixed by the court" (emphasis added), likewise indicates unequivocally that an early discharge is a prerequisite to a set-aside of the conviction. Merely serving the entire term of imprisonment or probation imposed by the sentencing court, regardless of whether it amounts to the maximum sentence that could have been imposed, does not suffice.5/

In sum, the statutory language, the legislative history, and the applicable case law all support the conclusion that a

---

5/ Petitioner also cites (Pet. 8) two district court decisions in support of his proposed construction of 18 U.S.C. 5021, United States v. Villar, 416 F. Supp. 887 (S.D.N.Y. 1976), and United States v. Sinkfield, 484 F. Supp. 595 (N.D. Ga. 1980). In each case, however, the comments were clearly dicta; no extended discussion or citation of authority accompanied the courts' brief remarks. See 484 F. Supp. at 598; 416 F. Supp. at 887. Moreover, in Sinkfield, the court was granting a motion for reduction of sentence under Fed. R. Crim. P. 35 and may well have thought that that action satisfied the early release requirement of Section 5021.

conviction is not automatically expunged when an offender is discharged upon completion of his entire sentence of probation, but does not obtain an early discharge. It was therefore proper in this case for petitioner's first conviction, which was never set aside, to serve as the basis for a recidivist sentence. Because the Arrington case, with its contrary conclusion, is plainly an aberration, further review by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982